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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

WAYNE J. BIASINI,
Petitioner,

against

NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the County Court
of Montgomery County

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WAYNE J. BIASINI, Petitioner,

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NEW YORK,
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QUESTIONS PRESENTED FOR REVIEW

1. Can a law enforcement officer, without exigent circumstances, while not in hot pursuit, without knowledge of the individual sought to be apprehended, without a warrant, without consent, and upon an alleged traffic violation which was never charged and admittedly could not have been

proven beyond a reasonable doubt, invade the sanctity of an individual's home and private property to conduct an investigative stop of that individual, forcibly detain him, and as a result thereof, make observations eventually forming the basis for a misdemeanor prosecution?

2. Do the Decisions of this Court in WELSH v. WISCONSIN, 104 S.Ct. 2091, (1984); DUNAWAY v. NEW YORK, 442 US 200, (1979); and PAYTON v. NEW YORK, 445 US 573, (1980) require the suppression of the evidence obtained against the petitioner on constitutional search and seizure issues?

3. Does a citizen have IV Amendment protection from the seizure of his person while situated behind his private residence in an area which was completely dark and unable to be viewed without the law enforcement officers first entering the real property without consent and proceeding

on foot into said backyard for investigative purposes?

4. Was the evidence obtained upon said facts properly required to be suppressed as decided by the Trial Court; or, was the intermediate Appellate Court correct in holding that no illegal search and seizure occurred?

5. Was the intermediate Appellate Court correct when it held that the holding of this Court in PAYTON v. NEW YORK, 445 US 573, (1980), was inapplicable because the petitioner had not crossed the threshold of the physical structure of his residence?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the Court whose Order is sought to be reviewed are Wayne J. Biasini, as petitioner, and New York, as respondent.

The petitioner was the original defendant in the proceedings completed in the Courts below. The respondent was originally named in the proceedings below as "The People of the State of New York" and was represented by the Office of the District Attorney of Montgomery County. Except for the designation of the parties and the change of the respondent from The People of the State of New York to that of New York, there have been no parties either added to or deleted from this proceeding from the date of its commencement.

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CITATIONS TO OPINIONS BELOW

The opinions of the Amsterdam Police Court and the County Court of Montgomery County are not reported in the New York State Reporter Service. The Certificate denying leave to appeal from the County Court of Montgomery County to the New York Court of Appeals is not presently reported in the New York Reporter Service, but will eventually be included therein when reached in its regular order for publication. All of said Court Decisions and Orders together with the Certificate denying leave to appeal are included in the Appendix to this Petition for a Writ of Certiorari.

JURISDICTION

This Petition for a Writ of Certiorari seeks to have permission granted to appeal to this Court from the final Order entered

in the County Court of Montgomery County which reversed the Order of the Amsterdam Police Court suppressing evidence and dismissing two accusatory instruments upon constitutional search and seizure issues. The jurisdiction upon which this Petition is filed is made pursuant to 28 USC 1257(3), 28 USC 2102 & 2104 and Rules 17, 19, 20, 21 and 23 of this Court. This proceeding seeks appellate review of the propriety and correctness of the Decision and resulting Order of the County Court of Montgomery County which held that the IV & XIV Amendment constitutional rights of the petitioner had not been violated by the actions taken by two law enforcement officers for the City of Amsterdam, New York.

It is respectfully contended in this Petition for Writ of Certiorari that the Decision and resulting Order of the County

Court of Montgomery County which reversed the Order of the Amsterdam Police Court is contrary to and in conflict with the decisional law of both this Court and other Courts of appellate jurisdiction. Appellate review is sought by this Court to resolve these conflicts. This Petition is being timely filed with this Court in that sixty (60) days have not elapsed since there was entered in the New York Court of Appeals a denial of the petitioner's timely filed Application seeking leave to appeal pursuant to the provisions of Section 460.20 of the Criminal Procedure Law of the State of New York. The date of entry of said Certificate denying leave to appeal was on September 13, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The IV Amendment to the United States

Constitution guarantees to a citizen that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The XIV Amendment to the United States Constitution guarantees to a citizen that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action is one involving a criminal prosecution brought by the People of the State of New York against the petitioner herein, Wayne J. Biasini alleging the commission of two violations of the Vehicle & Traffic Law of the State of New York, the same being driving while intoxicated and driving while having more than .10 percent of blood alcohol content. The petitioner appeared in the Amsterdam Police Court, the local criminal Court in Montgomery County to answer said accusatory instruments, was arraigned thereon and thereafter timely moved to suppress all evidence obtained as the result of the investigative stop, detaining and arrest of his person, in that the same

resulted from an unconstitutional search and seizure of his person in violation of the IV & XIV Amendments to the United States Constitution and related sections of the New York State Constitution. That motion was ultimately granted by the local criminal Court in favor of the petitioner, with the effect thereof being the suppression of evidence and the dismissal of the two accusatory instruments. From an Order of the Amsterdam Police Court granting that relief, the People of the State of New York appealed to the County Court of Montgomery County seeking appellate review thereof. The Decision and resulting Order entered upon that appeal was that no violation of the petitioner's constitutional rights against an unlawful search and seizure were violated, and that the matter was remanded to the Amsterdam Police Court for the

sentencing of the petitioner. That sentencing has been held in abeyance pending appellate review of the Decision and resulting Order reversing the Order of the local criminal Court suppressing evidence upon search and seizure issues.

On July 23, 1983, at approximately 3:15 a.m., two Amsterdam Police Officers, Thomas DiMezza and Richard Iwanski were in an Amsterdam Patrol vehicle which was parked on private business property. At that time they were talking with another Amsterdam Police Officer identified as Richard Stearns, who was in another patrol vehicle parked alongside their vehicle. Officer DiMezza'a attention was directed down the adjacent street (Forest Avenue) upon hearing a motorcycle engine. Officer DiMezza testified that "In his opinion" the two motorcycles were exceeding the speed limit, but that no charge was ever

made for said traffic violation because it could not have been proven in Court. The motorcycles proceeded north on Forest Avenue and Officers DiMezza and Iwanski began following them. At this location, there was a crest or hill on Forest Avenue and the two motorcycles were either at the top or had cleared the same when the police vehicle entered Forest Avenue. The identity or any physical appearance of the two operators of the motorcycles could not have been observed by the Amsterdam Police Officers because of certain safety equipment which was being worn (helmets). After Officers DiMezza and Iwanski left the private parking area, Officer Stearns also followed the two motorcycles. The light colored motorcycle was positioned ahead of the dark colored motorcycle and after the crest or hill on Forest Avenue, the highway leveled

off but still had a gradual incline until it approached a curve in the road. The light colored motorcycle was allegedly observed north of the curve to have turned into a private driveway, operated down the driveway and behing a private residence. This area where the light colored motorcycle was allegedly observed to have traveled was not illuminated and was instead, completely dark. Without the consent of the petitioner or any other person who had an ownership or possessory interest in the private property, Officer DiMezza operated the police vehicle into the driveway. The police vehicle was brought to a stop in the front of the driveway and Officer DiMezza and possibly Officer Iwanski got out of their vehicle and ran/ charged into the dark area of the private backyard. At that point in time, the motorcycle had been stopped, turned off,

its operator had alighted therefrom and had taken off his operating gear. This area was not visible from either the public highway or from where the police vehicle had been brought to a stop. At that time, the petitioner was walking into his house (he being a few steps from the rear door) when he was affronted, felt a hand on his shoulder, grabbed by Officer DiMezza and told that he was under arrest for driving while intoxicated.

The petitioner was ordered to proceed with Officer DiMezza to the patrol vehicle, where, for the first time, physical observations could occur. Based upon these observations, the petitioner was charged with driving while intoxicated, handcuffed, and placed in the police vehicle. At that point in time, the petitioner's mother came down from her bedroom, went outside and walked toward the police vehicle. Mrs.

Biasini testified that before she ever arrived at the vehicle and spoke with the Officers, she observed certain facts regarding her son's parked motorcycle, the operating gear positioned thereon, and the respective location of the house, the garage and the patio on the rear of the home which was not visible from the driveway. This testimony corroborated that of the petitioner as to the specific facts at the time of the seizure. Mrs. Biasini, who was then attired in a bathrobe, was told to get dressed and come down to the police station to pick up her son after he had been processed. She took this action and the petitioner was released in her custody approximately one hour later. At the time of the petitioner's release from custody, he had been issued two Uniform Traffic Tickets for alleged violations of Section 1192(2) & 1192(3) of the Vehicle & Traffic

Law of the State of New York.

The petitioner retained an Attorney and at his arraignment entered pleas of not guilty, requested supporting depositions and requested a period of forty-five (45) days to make motions. The supporting depositions did not set forth any basis for probable cause and upon request of the petitioner's Attorney, the Court ordered the complainants/law enforcement officers to provide it with their basis upon which the investigative stop and seizure of the petitioner behind his house occurred. In his affidavit, Officer DiMezza alleged under oath that the only basis upon which he pursued the motorcycles was an alleged one involving a speed violation, or a traffic violation as defined by the Vehicle & Traffic Law of the State of New York.

The petitioner made an Omnibus Motion addressing the factual circumstances in-

volved, which in part sought a dismissal of the accusatory instruments issued on constitutional grounds, and which requested a statutorily required pre-trial suppression hearing as is set forth in the Criminal Procedure Law of the State of New York. The Trial Judge declined to grant an independent suppression hearing before trial, but instead, decided to conduct the same together with the trial itself. That trial was conducted without a jury, for the petitioner had waived his right to the same. The petitioner proceeded to trial and at the conclusion of the People's proof and the conclusion of all of the proof the suppression issue was again presented to the Court, (who occupied the dual role of the trier of the law and the trier of the facts). A Decision on the motion was again deferred and the motions of the petitioner made for a Trial Order of Dismissal were

also reserved upon notwithstanding the fact that any Decision which was required to be made was to be done by the same Trial Judge.

The Court then proceeded to render its verdict finding the petitioner guilty of driving while ability impaired, a traffic infraction; and driving while having more than .10 percent of blood alcohol, a misdemeanor. The Court thereafter directed counsel to brief the constitutional issues involved and make the appropriate motions within a certain period of time. On November 8, 1983, the petitioner's motion initially seeking a suppression of evidence on constitutional grounds was granted, the reserved upon Trial Order of Dismissal granted, and the prior verdicts as issued by the Trial Judge set aside. The accusatory instruments were then dismissed and the petitioner was discharged from custody.

The People thereafter appealed from said Order to the intermediate Appellate Court, the County Court of Montgomery County, and by Decision and subsequent Order, the prior Order of the Amsterdam Police Court suppressing evidence was reversed, the verdicts reinstated and the case remanded for sentencing. The petitioner thereafter applied to the New York Court of Appeals for a Certificate granting leave to appeal, but the same was denied by the Honorable Richard D. Simons, Associate Judge.

The petitioner now seeks appellate review of the constitutional search and seizure issues involved in this action by Petition for Writ Certiorari to this Court.

This proceeding involves a review of the Order of a State Court as initially made on appeal. The basis for Federal jurisdiction is that the petitioner has

been subjected to an unlawful search and seizure of his person which said evidence has now been permitted to be used in support of a Judgment of Conviction. Jurisdiction for this Court to hear this appeal is authorized pursuant to 28 USC 1257(3), 28 USC 2102 & 28 USC 2104.

ARGUMENT

POINT #1

THE SUPPRESSION OF EVIDENCE ON CONSTITUTIONAL GROUNDS BY THE TRIAL COURT WAS CONSISTENT WITH THE DECISIONS OF THIS COURT INTERPRETING THE APPLICABILITY OF THE IV & XIV AMENDMENTS, AND THE DECISION OF THE COUNTY COURT OF MONTGOMERY COUNTY WHICH REVERSED THE TRIAL COURT SHOULD BE REVERSED BY THIS COURT WITH THE ORIGINAL ORDER BEING REINSTATED.

It is the respondent's position presented in this appeal that a law enforcement officer can, without exigent circumstances, while not in hot pursuit, without knowledge of the individual sought to be apprehended that he is being pursued, without a warrant, without consent, and upon an alleged traffic violation which was not charged and admittedly could not be proven beyond a reasonable doubt, invade the sanctity of an individual's home and private property to conduct an investigative stop of an individual, forcibly detain that

person, and as a result thereof, make observations eventually forming the basis of a misdemeanor prosecution. Upon a review of the decisional law of this Court, it is submitted that the respondent's position as accepted by the County Court of Montgomery County cannot be sustained.

In the recent Decision of this Court in Welsh v. Wisconsin, 104 S.Ct. 2091, (1984), it was held that before agents of the government may invade the sanctity of a home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. If the arrest in question is only for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a

neutral and detached magistrate. If the law enforcement officer involved undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant. The exigent circumstances exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to investigation of serious crimes; misdemeanors are excluded. The hot pursuit doctrine loses much of its support where there remains little or no threat to the public safety.

In United States v. United States District Court, 407 US 297, (1972), this Court held that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed". The Fourth Amendment was designed by the framers of the Constitution and has been

interpreted to protect citizens in being secure in their persons, houses, papers and effects from unreasonable searches and seizures, and which will require a warrant issued upon probable cause by a neutral magistrate to overcome said constitutional safeguard.

In Dunaway v. New York, 442 US 200, (1979), this constitutional safeguard was extended and made applicable to facts involving the seizure of an individual from an area which was concededly not his home. A citizen is constituionally protected from the seizure of his person, wherever situated, if the same was made without probable cause. A person is seized in the Fourth Amendment sense when taken involuntarily to a police station. The Fourth Amendment does apply to investigatory detentions or arrests. "Investigatory seizures would subject unlimited numbers of

innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry...." If an arrest is conducted for an investigatory purpose in the hope that something might turn up, the same intrudes so severely on the interests protected by the Fourth Amendment so as to trigger a safeguard against this police action.

In Payton v. New York, 445 US 573, (1980), this Court stated that the Fourth Amendment protects the individual's privacy in a variety of settings. "In none is the zone of privacy more clearly defined then when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms...'[a]t the very core

[of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion'...." "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."

In Delaware v. Prouse, 440 US 648, (1979), this Court stated "people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles."

In Silverman v. United States, 365 US 505, (1960), the Court addressed the constitutional safeguards of the Fourth Amendment as related to real property and the physical structure of the home, and held "we need not pause to consider whether or not there was a technical trespass under the local property law....At the very core

stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

In Coolidge v. New Hampshire, 403 US 443, (1971), it was held that "no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances, [the facts involving the seizure of the contents of an automobile parked in a driveway].

In Dorman v. United States, 435 F2d 385, (CA en banc DC 1968), various factors in determining exigent circumstances were discussed and are identified as (1) what grave offense is involved particularly one that is a crime of violence [in this appeal, the basis for seizing the petitioner involved a traffic offense of violating a speed ordinance - a non-criminal offense]; (2) is the suspect believed to be armed [in this appeal, no]; (3) more than

minimal probable cause is necessary [in this appeal, the Trial Court stated that it barely found minimal probable cause]; (4) a strong belief that the suspect is within the premises; (5) the likelihood of the suspect escaping if not swiftly apprehended; (6) was forcible versus peaceable entry upon consent effected [in this appeal, forcible, without consent]; (7) the time of entry -- day or night, [in this appeal - nighttime entry]. From a review of the facts in this action, most if not all of said factors must be answered in favor of the petitioner. Further, the Trial Court concluded as a matter of law that exigent circumstances were not present, which said legal finding has not been reversed by the intermediate Appellate Court.

When said constitutional considerations are applied to the facts in this

action, the petitioner submits that his constitutional rights were transgressed and that the Order made by the Trial Court was correct and should be reinstated. In reviewing the trial testimony of the law enforcement officers, it can be seen that they could not ascertain the identity of the operators of the motorcycles; that the petitioner's motorcycle proceeded behind or in back of his house outside of public view; that the petitioner was seized behind his home while entering the residence; that the petitioner never received any accusatory instruments other than those which were determined to exist by the law enforcement officers after the seizure of his person; and that the petitioner was not under arrest when brought out from in back of his home, a private residence. The other law enforcement officer testified that he observed the

motorcycle take a left and go out of sight behind the petitioner's residence; that he first formed an opinion as to the petitioner's intoxication while behind the house on private property after the petitioner had been seized; that there did not exist any failure to comply, which would negate any claims of a fleeing defendant to avoid capture; that the motorcycle could not be seen from the street and finally, that he knew he was entering a private driveway and private property to investigate the minor offense or traffic violation of speeding.

In his defense, the petitioner testified that he had lived at that location/home/private property for twenty-two (22) years; that he never knew anyone was pursuing him; that his motorcycle was parked, he had taken off all of his operating gear and placed it on the motor-

cycle, and that as he was proceeding into his house and being a few feet from the backdoor, he was grabbed from behind by one of the officers and told that he was under arrest for driving while intoxicated. At that time, there were no lights in the backyard of the home; that at least two or three minutes had elapsed before the law enforcement officers had entered into the backyard; and that he was grabbed, physically escorted and arrested in that backyard area of his private residence. Further, that the law enforcement officers did not have permission or consent to enter the backyard.

In the petitioner's defense, his mother, Natalie Biasini testified that when she exited their home, the motorcycle was parked on the patio, all of the petitioner's operating gear positioned thereon, (helmet, goggles and jacket), and that it would

normally take one or two minutes for the petitioner to complete this activity, (all of which had to be done before the law enforcement officers had made their forcible/ non-consentual entry into the private backyard).

In reversing the Order of the Trial Court, the County Court of Montgomery County held that the Decision of this Court in Payton v. New York was limited to only arrests occurring in the home; that said decisional law would not apply to the facts in this case for the petitioner was not arrested in his home, but rather in his backyard; that this Court made Payton only applicable once the doorway of the home was reached, thereby barring entrance into the building; and that no protection is provided on surrounding property adjoining or going beyond the petitioner's front door.

This interpretation of Payton by the County Court of Montgomery County is flawed. It fails to perceive the constitutional guarantees of the IV & XIV Amendments provided by the United States Constitution. It disregards the prior ruling of this Court in Dunaway v. New York, for in that case, the petitioner was not even on his own property, and this Court held that the IV Amendment still protected the petitioner from unreasonable searches and seizures. In limiting the applicability of Payton to the actual physical structure of the house, the County Court of Montgomery County misinterprets the Decision of this Court, for Payton held that while in one's home, that would constitute the greatest area of protection to be free from unreasonable governmental intrusion. No where in Payton does it hold that a person does not have

IV Amendment protections while not inside of the physical dimensions of their house/ residence. To accept the Decision of the County Court of Montgomery County, the holding of this Court in Delaware v. Prouse must be disregarded and cast aside, for in that case, IV Amendment protection was available to an individual while operating a vehicle. Finally, although the Decision of this Court in Welsh v. Wisconsin was presented to the County Court of Montgomery County in the petitioner's Brief, (as a defendant-respondent), the same was neither cited nor even commented upon by the intermediate Appellate Court. It is submitted that such citation could not have been made and the present ruling allowed to exist, for the holding in Welsh v. Wisconsin is absolutely contradictory to the Decision of the County Court of Montgomery County.

The private backyard of a citizen is

an area protected by the IV Amendment, and absent probable cause, exigent circumstances, etc., the same may not be entered to effect the arrest of a person absent certain exceptional circumstances. IV Amendment protections do not cease at the four outer walls of an individual's home. In a non-felony case, a citizen's IV Amendment rights arise at the entire boundary of one's property, or as was held in Dunaway, even while sitated on another's property. Any argument which attempts to limit the IV Amendment and its applicability to only the home, fails to comprehend the scope and extent of the protections guaranteed. This constitutional safeguard is not shorn from an individual simply because they may be outside of the four walls of their home. While any such protection may necessarily be lessened based upon an ad hoc considera-

tion of the facts of each case, the IV Amendment still provides a basis to protect against unlawful searches and seizures directed against a citizen.

The petitioner respectfully submits to this Court that the Decision and resulting Order of the County Court of Montgomery County is contrary to the specific holdings of this Court and that the limitations imposed in interpreting Payton are erroneous. For this reason, the Petition for a Writ of Certiorari should be granted to reverse and vacate the Order of the County Court of Montgomery County and to reinstate the Order of the Trial Court.

CONCLUSION

THE PETITION REQUESTING A WRIT OF CERTIORARI SHOULD BE GRANTED; THE ORDER AND UNDERLYING DECISION OF THE COUNTY COURT OF MONTGOMERY COUNTY REVERSED AND VACATED; THE ORDER OF THE TRIAL COURT REINSTATED; AND THIS CASE REMANDED TO THE COURTS BELOW FOR THE ENTRY OF AN ORDER CONSISTENT THEREWITH.

Dated: November 11, 1985.

Respectfully submitted,

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APPENDIX

Decision Granting Suppression on Constitutional Search and Seizure Issues

STATE OF NEW YORK
AMSTERDAM POLICE COURT
COUNTY OF MONTGOMERY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against

WAYNE J. BIASINI,
Defendant.

TRANSCRIPT OF DECISION of Honorable Michael J. Riccio, Amsterdam Police Court Judge, in the above entitled case on the 8th day of November, 1983 at the Courthouse located in the City of Amsterdam, New York.

A 2

Decision Granting Suppression on
Constitutional Search and Seizure Issues

APPEARANCES:

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Decision Granting Suppression on Constitutional Search and Seizure Issues

THE COURT: Yes. This morning I made some notes and the purpose of the decision that I am about to render, I have difficulty reading my own notes, so I dictated my notes to the clerk of the court and she reduced them in typewritten form. The issues before this court is whether or not the warrantless arrest of this defendant in the driveway of his residence for driving a vehicle while under the influence of alcohol was lawful and not violative of his 4th Amendment right. The trial proof contains no evidence or, at most, questionable evidence stating that the arresting officer had reasonable cause to believe that the defendant operating a motor vehicle on a public highway while under the influence of alcohol, before he, the arresting officer, entered upon the driveway of the defendant's home in pursuit of the defendant's vehicle. In the making

by the arresting officer was of observation of the defendant after the defendant turned off the motor of his vehicle and lighted from same in the driveway. Therefore, in conclusion, conclusion cannot be avoided that the arresting officer was without authority to enter upon defendant's premises pursuant to C.P.L. 140.15 Subdivision 4, to effect the arrest of the defendant for a violation of the Vehicle and Traffic Law, 1192. Even if there were exigent circumstance, the people contend that the arresting officer was in pursuit of the defendant's vehicle because of the operation by the defendant of the vehicle on Forest Avenue which, according to the officer, provided reasonable or probable cause to believe the defendant was committing a traffic infraction or infractions in his presence. Thence, to resolve the issue of

the propriety of the Vehicle and Traffic Law 1192 arrest, it became necessary to address the narrow question, namely, assuming the argument even if the arresting officer had reasonable cause to believe the defendant committed a traffic infraction, did this give the arresting officer authority to extend the pursuit of the defendant's vehicle into and upon his resident property? I am of the opinion "hot pursuit" of the defendant's vehicle into his premises was not justified in this case. There is no question that a police officer has not only the authority, but also the obligation to pursue an offending operator of a motor vehicle in public for traffic infractions. The duty to pursue, however, in not so much as to apprehend the violator as to avoid danger to the public posed by the operation of the vehicle. In this case,

Decision Granting Suppression on Constitutional Search and Seizure Issues

once the defendant left the highway to enter his premises, there no longer was any danger to the public associated by the wrongful operation of his vehicle. I find that the police intruded upon the defendant's premises with, at most, minimal reasonable cause to believe that he committed a traffic infraction and no exigent circumstances existed warranting such intrusion. And therefore, the court is constrained to conclude that the arrest of the defendant was unlawful because it was violative of his 4th Amendment Rights under the United States Constitution. Now, the court reserves on the defendant's motion for a trial order of dismissal after the verdicts were rendered by the court as sole trier of the facts. In reaching this decision, the court has determined the motions upon such evidence as it would have

been authorized to consider upon the motions had the court not reserved decision. That is the decision of the court. You can submit an order, informally, not as part of this decision. The decision of this court is in no way to reflect upon the police officers. It's stated the police officers did have probable cause to pursue. I do not make any finding that the police officers deliberately and with the intent to violate the defendant's rights, entered upon his property. I decided the case in such a matter as to establish that the rights of a defendant in connection with the administration of the criminal justice system has to be protected. If such protection can be afforded him without exposing the public to any depravement or danger, and this is a case where I think there was was no danger on the public. And the police

officer, Mr. DiMezza, in the exercise by him, what he considers to be his conscientious duty, performed in such a matter, not in an intentional way, but in a way that was violative of the rules that are applicable to this case.

* * * * * *

Order Granting Suppression of
Evidence on Constitutional Issues

At a Trial Term of the Amsterdam Police Court held in and for the City of Amsterdam, New York, at the Courthouse located in the City of Amsterdam, County of Montgomery, State of New York, on the 8th day of November, 1983.

PRESENT: HONORABLE MICHAEL J. RICCIO,
Justice Presiding

STATE OF NEW YORK
AMSTERDAM POLICE COURT
COUNTY OF MONTGOMERY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs,

against ORDER

WAYNE J. BIASINI,
Defendant.

The issues in the above entitled criminal action having come on for trial before the Honorable Michael J. Riccio, without a jury, pursuant to the defendant's written waiver of his right to a jury trial made and approved by the Court in accordance with CPL 320.10 & 340.40, at a Trial Term

Order Granting Suppression of
Evidence on Constitutional Issues

of this Court, held at the Courthouse located in the City of Amsterdam, New York, on the 19th and 20th days of October, 1983, and the issues in this action having been duly tried and the Court, as sole trier of the facts, having rendered a verdict finding this defendant guilty of violations of subdivisions 1 & 2 of Section 1192 of the Vehicle & Traffic Law, and the defendant having prior to trial and at the close of the People's proof moved for the suppression of certain evidence upon the grounds of a violation of the defendant's constitutional rights, and the defendant having also moved at the close of the People's proof, at the conclusion of all the proof and upon the rendering of verdicts, for a Trial Order of Dismissal made pursuant to CPL 290.10, and the Court having reserved Decision with respect to each of the defendant's said

Order Granting Suppression of
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Motions, and the defendant having also moved for an Order vacating and setting aside the verdicts of this Court pursuant to CPL 330.30, and the Court having directed the District Attorney and the defendant's Attorney to submit their respective positions in writing to the Court, and the Motions of the defendant having come on for oral argument on the 8th day of November, 1983, and the Court having examined and reviewed the papers submitted upon questions of law and also having heard oral arguments of the District Attorney and the defendant's Attorney, and after due deliberation the Court having rendered its Decision on the record that the arrest of the defendant was unlawful because it was in violation of his Fourth Amendment rights

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under the United States Constitution,

Now, on Motion of Robert J. Krzys, Esq., Attorney for the defendant, Wayne J. Biasini, it is hereby

ORDERED, that the defendant's Motion to suppress be and hereby is granted, nunc pro tunc, and it is further

ORDERED, that the defendant's Motion for a Trial Order of Dismissal pursuant to CPL 290.10, be and hereby is granted, nunc pro tunc, and it is further

ORDERED, that the defendant's Motion to set aside the verdicts of this Court be and hereby is granted, pursuant to CPL 330.30(1), and it is further

ORDERED, that the Simplified Traffic Informations charging the defendant with violations of subdivisions 2 & 3 of Section 1192 of the Vehicle & Traffic Law be and

hereby are dismissed, and the defendant be and hereby is discharged with respect to the same.

Order signed and filed this 15th day of November, 1983, at Amsterdam, New York.

E N T E R

/s/Michael J. Riccio
HONORABLE MICHAEL J. RICCIO
Amsterdam Police Court Judge

Decision of County Court of Montgomery County Reversing Local Criminal Court on Constitutional Search and Seizure Issues

STATE OF NEW YORK
COUNTY COURT
COUNTY OF MONTGOMERY

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs-Appellants,

against DECISION

WAYNE J. BIASINI,
Defendant-Respondent.

BEST, ROBERT P., ACTING COUNTY JUDGE:

The Montgomery County District Attorney appeals a Trial Order of Dismissal, which the Amsterdam Police Court Justice entered in the above-entitled prosecution for Driving While Intoxicated. The Court has found at a Bench Trial, that evidence proved the defendant's guilt on the charges, beyond a reasonable doubt. The Justice, however, found that evidence against the defendant constituted fruit from an illegal arrest, and pursuant to CPL 290.10,

the Court set aside the verdict, and dismissed the counts of the traffic information. The People appeal seeking to reinstate the verdict. The defense seeks to dismiss this appeal on procedural grounds, and challenges the appeal on the merits, alleging that the police lacked probable cause for the defendant's warrantless arrest, and further assert that the evidence against the defendant resulted from an illegal search and seizure.

FACTS

On July 22, 1983, Amsterdam Police Officer Thomas DiMezza, observed two motorcycles, who the officer believed to be speeding. When the officer gave chase, the motorcycles separated, and Officer DiMezza followed one motorcycle into a

residential driveway. When the officer left his vehicle, and went behind the residence, he observed the defendant Wayne Biasini off the motorcycle, on his way into the house. The Officer made observations that indicated that the defendant was intoxicated. At trial, Officer DiMezza testified that Biasini appeared unsteady and had trouble getting off the bike. At the Officer's Patrol car, the defendant had trouble producing his paper work, and his breath smelled from the odor of alcohol. DiMezza noticed that Mr. Biasini's eyes were watery and bloodshot. At that point, the Officer arrested the defendant for Driving While Intoxicated. Following the arrest, the defendant admitted that he was drinking. A chemical test, which the defendant submitted to, indicated the defendant's Blood

Alcohol Content to be .15%. Police issued two traffic tickets to Mr. Biasini, charging Driving While Intoxicated, in violation of Vehicle and Traffic Law, Sections 1192.2 and 1192.3.

Police Court Justice Michael J. Riccio conducted the defendant's trial after the defense waived a trial by jury. Contemporaneous to the trial, Justice Riccio also considered the defense's written Omnibus Motion, which the defense counsel had submitted prior to trial. The Court found the defendant guilty of driving while his ability was impaired, and of driving in violation of Vehicle & Traffic Law Section 1192.2. The Court reserved decision on the defendant's motion for a trial order of dismissal. At a later hearing, the Court granted that motion, pursuant to Criminal

Procedure Law 290.10, finding that although the Police had probable cause to arrest the defendant, that the arrest constituted an illegal seizure, as the police had improperly entered the defendant's premises without an arrest warrant. The evidence gathered following that illegal arrest was therefore tainted and inadmissible.

THE ISSUES ON APPEAL

The District Attorney appeals the Police Court Order, dismissing the charges. The prosecution's main contention is that the defendant's arrest was legal, based upon probable cause, and was permitted upon the defendant's premises, based on exigent circumstances. The defense opposes the appeal, alleging that the arresting officer lacked probable cause to stop the

defendant originally, and further lacked either a warrant or exigent circumstances, to enter private property to make an arrest for a traffic infraction. The defense also seeks the appeal's dismissal, claiming that the prosecution did not file an affidavit of errors or statement pursuant to CPL 450.20(8) and 450.50. As a third point, the defendant attacks the Trial Court's proceedings in rendering the guilty verdict, alleging that both the Trial Order of Dismissal and the Suppression Issues were not considered at a proper time. The Court will deal with the procedural matters first.

THE PROSECUTOR'S APPEAL

The defense contends that this Court lacks jurisdiction over this appeal, as the

prosecutor has failed to file an affidavit of errors or a statement on the suppression of evidence, pursuant to CPL 450.20 and 450.50. CPL Section 450.50 requires that where a prosecutor appeals a suppression order, pursuant to CPL Section 450.20(8) that the prosecutor must submit a statement asserting that the deprivation caused by suppressing specific evidence would damage the prosecutor's case badly as to destroy the possibility of a conviction. The section seeks to prevent interlocutory appeal from pre-trial suppression orders. The required statement by the prosecutor shows that due to the suppression, the suppression order amounts to a final judgment. (BELLACOSA, PRACTICE COMMENTARY, MC KINNEY'S CONSOLIDATED LAWS OF NEW YORK, BOOK 11A, p. 568).

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In this matter, however, the prosecutor does not appeal, pursuant to 450.20(8), based upon a pre-trial suppression. The prosecutor here appeals pursuant to 450.20(2), from an order under CPL 290.10, setting aside a verdict and dismissing an accusatory instrument. In this matter, the statute requires no suppression statement from the prosecutor, as the 290.10 order constitutes a final judgment, not an order suppression evidence. Such statement is not required where the trial court has dismissed an indictment, as well as suppressing evidence. (PEOPLE V. BROOKS, 54 AD 2d 337, 388 NYS 2d 450, 4th Dept., 1976). The Trial Judge's Order, signed on November 15, 1983, also noted that the Trial Court was also setting aside the verdict under CPL 330.30. Under CPL section 450.20, there is no suppression statement required on an appeal from this judgment either.

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THE DISMISSAL AND SUPPRESSION MOTIONS

Contemporaneous to defendant's trial, the Police Court Justice, also considered defense counsel's omnibus motion, seeking to suppress the evidence gathered, resulting from the defendant's arrest. On this appeal, the defense alleges that the Court should have rendered a decision on the motion prior to trial, since the defense filed the motion pre-trial. Counsel asserts that CPL 710.60 requires the motion be determined "prior to trial, with specific findings of fact being made." However, a review of the statute indicates that counsel is in error as to the quoted assertion. CPL Section 710.60 contains no such provision that a pre-trial omnibus motion requires a pre-trial determination. Section 710.60(6) states only that regardless of whether the Court conducts a hearing, the Court must set forth a determination of the motion and findings of fact,

on the record. Where there is an omnibus motion to be considered, as long as a jury is not involved, or is not present at the hearing, a suppression hearing can be properly conducted as part of a trial itself, by the trial judge. (PEOPLE V. PEASE, 67 Misc. 2d 359, 324 NYS 2d 129; PEOPLE V. BRANNAKA, 46 AD 2d 929, 361 NYS 2d 434, 3rd Dept., 1974).

In this case the Trial Court did set out his findings of fact on the record. The transcript, from the November 8, 1983 hearing, at page 34, contains the Court's findings that the Amsterdam Police had probable cause to stop defendant's vehicle for speeding, but the probable cause to stop for a traffic infraction did not entitle the police to enter defendant's property to arrest him. As police lacked

exigent circumstances to enter the defendant's property, the following arrest was illegal. The Court then granted the Trial Order of Dismissal. In the Court's written decision, signed on November 15, 1983, the Court granted the motion to suppress the evidence gathered as a result of the illegal arrest, and the Court granted the Trial Order of Dismissal, and the motion to set aside the verdict. A pre-trial hearing, with a written decision may have been a little less confusing way to handle the defense omnibus motion, however, the Trial Court's procedures, do not constitute any reversible error, since there was a full and fair hearing on the motion as part of the trial. The findings of fact are set out, and the record serves as an ample basis for review on the determination. (PEOPLE V.

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RUSSO, 45 AD 2d 1040, 35 NYS 2d 890; PEOPLE V. THOMAS, 58 AD 2d 899; 397 NYS 2d 8).

As to the Trial Order of Dismissal, the defense contends again that the statute in question on that motion, CPL Section 290.10, required a decision at the close of the prosecution's case, and counsel faulted the Trial Judge for failing to timely decide the issue. Counsel alleges that the Court should have dismissed the information before verdict, thus precluding the prosecutor from the right to appeal this dismissal based on a final judgment. However, CPL Section 290.10 does not state that the Court must grant a dismissal at the close of the prosecutor's case, but says that the Court may dismiss at that time, or may dismiss after the verdict.

Decision of County Court of Montgomery County Reversing Local Criminal Court on Constitutional Search and Seizure Issues

In the defendant's trial, the Court considered the defendant's suppression motion as well as the defendant's guilt during the trial, and the determination on the suppression motion ultimately led to the dismissal.

Defense counsel contends that the decision's timing had a legal consequence, since a decision at the close of the People's case, would have precluded this appeal. However, only a trial order of dismissal based on consideration of evidence, and thus tantamount to an acquittal, would bar further prosecution under double jeopardy. An order not related to guilt or innocence such as in this case, would not bar further prosecution. (PEOPLE V. ZAGAGINO, 1980, 74 AD 2d 115; 427 NYS 2d 40). In the defendant's

case, the trial judgment clearly based his dismissal order on the alleged illegal arrest, and found that the defendant's guilt had been established.

THE DEFENDANT'S ARREST

The Trial Court found that the Police illegally arrested the defendant, because the officers entered private property to arrest, based upon observing a traffic infraction. The Court reasoned that the Supreme Court's holding in PAYTON V. NEW YORK (445 US 573), forbade the police to enter private property to make an arrest without a warrant, based only on reasonable cause to believe that the defendant had committed a traffic infraction. The Court found the defendant guilty on the charges, and found reasonable cause to stop

the defendant for speeding, if the stop had come on a public roadway, rather than defendant's driveway. The defense has not filed a cross-appeal, challenging either the determination of guilt, or the determination of reasonable cause, but contend only that the arrest on the defendant's premises was a violation of the fourth amendment, for lack of a warrant, or exigent circumstances. The final question on this appeal, will then rest on whether the Trial Court correctly interpreted the law on whether the police were entitled to enter the defendant's driveway, to pursue him for a traffic violation. On this review, it appears that the Trial Court interpreted the law incorrectly.

The Trial Court's main source for its ruling on the defendant's arrest was PAYTON

(supra) and other cases dealing with warrantless arrests in the defendant's home. PAYTON will not apply, because the defendant was not arrested in his home, but rather police stopped Biasini in his backyard. PAYTON clearly set a barrier at the door to the defendant's home, the Supreme Court drew a barrier at the entrance to the home, and barred entrance to the building. The PAYTON ruling does not go to surrounding property beyond the defendant's front door. The defense has cited other authorities for the proposition that the defendant's zone of privacy may extend beyond the home. (DUNAWAY V. NEW YORK, 442 US 200, 99 S.Ct. 2248; DELAWARE V. PROUSE, 440 US 648, 99 S.Ct. 1395). However, PAYTON dealt specifically with authority for a warrantless arrest, and no

cases have extended PAYTON'S zone of privacy beyond the home.

In the absence of PAYTON'S projections, the analysis would center on the legality of a warrantless arrest outside the home. CPL Section 140.10 authorizes police officers to make warrantless arrests, where he has reasonable cause to believe that such an offense was committed in his presence. A police officer may stop a vehicle on a highway if the police have reasonable cause to believe that a driver committed a traffic infraction in their presence. (PEOPLE V. DAVID L., 56 NY 2d 698; PEOPLE V. INGLES, 36 NY 2d 413). Once a driver has been stopped, a police officer may make an arrest for a traffic infraction as long as reasonable cause appears to show the offense was committed in the officer's

presence. (PEOPLE V. NEUSCHATZ, 88 Misc. 2d 433, aff'd 40 NY 2d 935).

In this case, a police officer observed a motorcycle speeding along an Amsterdam street, and gave chase. The officer had reasonable cause then to stop the motorcycle, and ticket the driver. Upon finally catching up to the defendant, outside the defendant's home, the officer then detected the odor of alcohol on the defendant's breath, and observed signs of physical impairment. The officer then arrested the defendant, and defendant later admitted to drinking, and submitted to a blood alcohol analysis, which resulted in a showing that defendant was driving his motorcycle with an alcohol blood level above .10. Where an officer stops a driver for a traffic infraction, and then

observed such signs as slurred speech, bloodshot eyes and the odor of alcohol, such officer has reasonable cause to believe the defendant was intoxicated (PEOPLE V. DONALDSON, 36 AD 2d 37, 319 NYS 2d 172). If the officer, after stopping motorist, has reasonable cause to believe that motorist was driving while intoxicated, he can arrest him, and evidence of motorist's breath by screening device, would constitute search and seizure incident to a lawful arrest (PEOPLE V. GRASER, 1977, 90 Misc. 2d 219, 393 NYS 2d 1009).

As the police had reasonable cause to stop defendant for a traffic infraction, and as an officer then had reasonable cause to arrest defendant for Driving While Intoxicated, the defendant's arrest and

subsequent search were legal. The arrest is in no way tainted, by its location on the defendant's patio, as the stricter standards for warrantless arrest, requiring exigent circumstances commence at the door to defendant's dwelling, and not before. (PAYTON V. NY 445 US 573; PEOPLE V. LEVAN 62 NY 2d 139). The evidence against defendant that resulted from this arrest, was therefore properly in evidence before the trial court.

The Trial Court incorrectly issued a Trial Order of Dismissal based on CPL 290.10. Section 290.10(2) clearly states that such order will not issue where trial evidence would have been legally sufficient had the Court not erroneously excluded admissible evidence offered by the People. The Trial Court's Order also set aside the guilty

verdict here, under CPL 330.30(1) based on grounds that the trial evidence was result of an illegal search and seizure. As the defendant's arrest was indeed legal, as was the ensuing search, the motion to set aside the verdict, was also granted incorrectly.

CONCLUSION

The People have appealed properly to this Court pursuant to Criminal Procedure Law Section 450.40. As the trial court has improperly set aside and dismissed the guilty verdict against the defendant, this Court reverses the Police Court Orders of Dismissal, and reinstates the guilty verdict. The case is then remanded to Amsterdam Police Court for sentencing, pursuant to the guilty verdict.

Decision of County Court of Montgomery County Reversing Local Criminal Court on Constitutional Search and Seizure Issues

/s/Robert P. Best
HON. ROBERT P. BEST
Acting Montgomery County Judge

Signed this 16th day of May, 1985, at Johnstown, New York.

Order Reversing Local Criminal Court

At a Trial Term of the County Court held in and for the County of Montgomery at the Courthouse located in the Village of Fonda, New York on the 4th day of March, 1985.

PRESENT: HON. ROBERT P. BEST, Judge

COUNTY COURT
COUNTY OF MONTGOMERY
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

ORDER
City of Amsterdam
Police Court
Docket No: 92-T

WAYNE J. BIASINI,
Defendant-Respondent.

THE PEOPLE OF THE STATE OF NEW YORK having appealed from an Order signed on November 15, 1983 by Hon. Michael J. Riccio, City of Amsterdam Police Court Judge, and said appeal having been presented during the above-stated term of this Court, and

Order Reversing Local Criminal Court

having been argued by Hon. Howard M. Aison, Montgomery County District Attorney, for appellant and Robert J. Krzys, Esq., for respondent, and, after due deliberation, the Court having rendered a Decision on the 16th day of May, 1985, it is hereby

ORDERED that the Order of City of Amsterdam Police Court Judge Michael J. Riccio signed and entered on the 15th day of November, 1983 granting the defendant's Motion to Suppress, a Trial Order of Dismissal pursuant to CPL 290.10 and setting aside the verdicts pursuant to CPL 330.30 1, be and the same is hereby reversed, and it is further

ORDERED that the guilty verdict rendered by the Court and rendered on October 20, 1983, finding that the defendant-respondent was guilty, beyond a reasonable doubt, of Driving while ability

impaired (VTL 1192 1) and having .10 of one per centum or more by weight of alcohol in his blood (VTL 1192 2) be and the same is hereby reinstated, and it is further

ORDERED that this matter be and the same is hereby remitted to the City of Amsterdam Police Court for the sentencing of the defendant-respondent, pursuant to said guilty verdicts.

Signed this 31st day of May, 1985 at Johnstown, New York.

ENTER: /s/Robert P. Best
HON. ROBERT P. BEST
Acting Montgomery County Judge

Certificate Denying Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. RICHARD D. SIMONS,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

CERTIFICATE
DENYING
LEAVE

WAYNE J. BIASINI,
Appellant.

I, RICHARD D. SIMONS, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Certificate Denying Leave to Appeal

Dated at Albany, New York

September 13, 1985

/s/Richard D. Simons
Associate Judge

*Description of Order: Appeal from an order of County Court, Montgomery County, dated May 31, 1985 which reversed an order of City of Amsterdam Police Court, entered on November 15, 1983.